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FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

80-2055

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

LETCHER T. WHITE, PETITIONER

VS.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF
APPEALS SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD
FOR LETCHER T. WHITE

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R. KEITH NOLLEY
OF COUNSEL FOR
THE FIRM

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

LETCHER T. WHITE, PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Letcher T. White, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 16, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Letcher T. White's constitutional rights were violated when

evidence used to convict him was obtained by a warrantless search.

2. Whether or not Sec. 521 of the Surface Mining Act, 30 U.S.C. 1271 violates Letcher T. White's right to due process by permitting the issuance of a cessation order without a prior hearing or showing of proper cause.

3. Whether or not the requirement of the Surface Mining Act to cease mining prior to a hearing on the merits of the order to cease mining is a taking without compensation and therefore violative of Letcher T. White's constitutional guarantees.

4. Whether or not the right to review acts of officials issuing cessation orders under the Act after the fact is sufficient under the Act to provide Letcher T. White due process of law in a criminal prosecution.

PARTIES TO THE PROCEEDING

The Defendant Letcher T. White, Appellant in the U.S. Court of Appeals for the Sixth Circuit was and has been represented in all proceedings by Yancey White of the law firm, Maddin, White, Huseman, Pletcher & Powers, 2100 The Six Hundred Building, Corpus Christi, Texas 78473. The United States of America was represented in the trial court by United States Attorney, Patrick H. Malloy, P.O. Box 1490, Lexington, Kentucky 40501. The United States of America was represented in the United States Court of Appeals for the Sixth Circuit by Kathryn A. Oberly, c/o Department of Justice, Washington, D.C. 20530, and Richard H. Levi, c/o Department of Justice, Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, pg. A1. The judgment of the United States District Court for the Eastern District of Kentucky is printed in Appendix A hereto, pg. A4. The journal entry of judgment of the United States District Court is printed in Appendix A hereto, pgs. A8 to A12.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A, pg. A1) was entered on February 16, 1981. A timely petition for Rehearing En Banc was denied on April 3, 1981 (Appendix A, pg. A13). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. Sec. 1254.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved are

The Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, in particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution:

> "No person shall be held to answer for a captital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in causes arising in the land or naval forces, or in the Militia, when in actual service and time of War or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public uses, without just compensation."

The relevant portions of the Surface Mining Control Reclamation Act are 30 U.S.C.A. 1267(a), 30 U.S.C.A. 1267(b)(3), 30 U.S.C. 1268(a, b, c, d, e, f), 30 U.S.C.A 1271(2). (Appendix A, pgs. A14 to A18).

STATEMENT OF CASE

On December 15, 1978, an information was filed by the United States Government charging Defendant, Letcher T. White, and others not relevant to this appeal, under 30 U.S.C.A. 1268(e, f), (See Appendix A, pg. A16) for failing and refusing to comply with an order of cessation issued by the Department of Interior. The Defendant was arraigned on December 21, 1978, and entered a plea of not guilty. On February 1, 1979, the Defendant filed a Motion for Discovery and Inspection, a Motion to Suppress Illegally Obtained

Evidence, a Motion to Dismiss for Violation of the Defendant's Fourth and Fifth Amendment Constitutional Rights, a Motion to Dismiss the Information, a Motion for Bill of Particulars, and a Motion to Dismiss for Abuse of Process. On March 5 and 6, 1979, a hearing was held on Defendant's motions. The court granted in part and denied in part the Motion for Discovery and Inspection, Defendant's Motion for Bill of Particulars was overruled, and the hearing was continued until April 30, 1979. At that time Defendant's Motion to Suppress Illegally Obtained Evidence was overruled, Defendant's Motion to Dismiss for Violation of Defendant's Fourth and Fifth Amendment Constitutional Rights was overruled, and Defendant's Motion to Dismiss the Information pursuant to Rule 12b was overruled.

On May 1, 1979, a jury was selected; and on May 2, 1979 the jury was sworn and the United States moved to amend the criminal information pursuant to Rule 7(e) and the Court granted their motion and amended the information. The jury trial was held and on May 4, 1979, the jury returned its verdict of guilty. On October 31, 1979, the court entered its judgment in the case which was filed in the Eastern District of Kentucky on November 2, 1979. On November 8, 1979, Defendant Letcher T. White filed his Notice of Appeal in the United States District Court for the Eastern District of Kentucky, London Division, London, Kentucky.

The appeal was duly perfected to the United States Court of Appeals, Sixth

Circuit. Briefs were filed and oral argument was presented. On February 16, 1981, the court rendered its judgment in the case (See Appendix A, pg. A1). The operative facts of the case are as follows:

In the fall of 1978, the Defendant, Letcher T. White, and W.D. Coal Company, Inc. were strip mining in eastern Kentucky under a permit issued to Leslie Coal and Energy Engineering, Inc. On October 20, 1978, a warrantless inspection of the mine site was made by the government's authorized represented, Mr. David Schindler. Based on his inspection, Mr. Schindler issued a Notice of Violation based on four "violations" he found. The Defendant was given until November 3, 1978, to abate the violations found by the inspector. On November 3, 1978, another warrantless inspection was made of the

mining site, and pursuant to that inspection, a cessation order was issued by David E. Schindler based on Defendant's alleged failure to abate two of the conditions as outlined on Notice of Violation filed October 20, 1978. Defendant Letcher White continued to mine; and on December 15, 1978, a criminal information charging Letcher White for failure to obey a cessation order was filed in the district court. Defendant, Letcher White, continued to operate the mine on three theories. (1) That Schlinder's interpretation of the regulation requiring material to be transported to the toe of the hollow fill meant "truck" (See Appendix A, pg. A19 to A21) and in Letcher White's opinion this was not correct nor the law. (2) Letcher White felt that based on representations of Schindler's supervisor, Hayes, that correct construction of the hollow fill

was under consideration by them and that therefore until that matter was resolved he could continue to mine. (3) That he was in the process of correcting the violations and could therefore continue to mine.

The Court held that the cessation order was valid as a matter of law and the only real issue for the jury was whether or not White continued to mine after its issuance, which White did not deny.

REASONS FOR GRANTING WRIT

This case is destined to be a landmark decision. The Defendant Letcher White is the first and believed to be the only person to-date criminally prosecuted under the provisions of the Surface Mining Act for an alleged violation of a cessation order. The Court's decision

will henceforth guide and instruct the courts, coal operators, and the administrative agencies in the administration of the Act with respect to criminal conduct.

The case raises fundamental constitutional questions under the Fourth and Fifth Amendments to the Constitution and this Court's decision will have a tremendous lasting and far-reaching impact on the coal mining industry of this energy-starved nation.

It is one thing to assess civil penalties, however, it is quite a different proposition to send strip mining operators to prison for the alleged violation of an unpublished interpretation of a regulation.

The question of warrantless searches of business property is the subject of much recent litigation. Presently being reviewed by this Court is the case of Marshall v. Dewey, 493 F.Supp. 963 (E.D.Wisc. 1980) (U.S. appeal pending), where the district court held that a warrantless seach of a stone quarry was unconstitutional.

The Surface Mining and Control Act (30 U.S.C.A. 1202, et seq.) has been declared unconstitutional in parts pertinent to this appeal in the case of Virginia Surface Mining and Reclamation Association, Inc., et al vs. Cecil D. Andrus, et al , 483 F.Supp. 425 (W.D.Va. 1980), 101 S.Ct. 67, presently being considered by this Court. The constitutional issues for review by the this Court in part as taken from the headnotes of the case are as follows:

"10. Authority given in Surface Mining Control and Reclamation Act of 1977 to Office of Surface Mining Inspectors to issue cessation orders without prior hearing or showing or probable cause constituted arbitrary abuse of power and denial of due process of law under Fifth Amendment. Surface Mining Control and Reclamation Act of 1977, Sec. 521, 521(a)(1, 3, 5), 525, 525(a, c), 526 (a)(2), (b), 30 U.S.C.A. Sec. 1271, 1271(a)(1, 3, 5), 1275, 1275 (a, c), 1276(a)(2), (b); U.S.C.A.Const. Amend. 5."

"12. Provisions of Surface Mining Control and Reclamation Act of 1977 requiring mine operator to pay any imposed penalty and cumulative penalties prior to adjudication of fault were unconstitutional as denying due process. Surface Mining Control and Reclamation Act of 1977, Sec. 518, 30 U.S.C.A. Sec. 1268; U.S.C.A.Const. Amend. 5."

In the same case now before this Supreme Court, the district court further addressed the issue of eminent domain found in the Fifth Amendment of the U.S. Constitution. It was held in the district court decision that although a taking will normally occur as a result of condemnation proceedings, substantial burdensome interference by the Government may amount

to a "constructive taking", and as such should have provided compensation. The district court further adjudged the Surface Mining and Reclamation Act of 1977 to be in itself "unconstitutional" because it required the restoration of the land to approximate original contour; the court held "such requirment to be a taking of land and . . . unconstitutional."

Judge Williams, in his discussion of the procedural due process aspects of the Surface Mining Act at Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F.Supp. 425, (W.D.Va. 1980), thoroughly explored the administrative remedies and the practical aspect of surface mining. Judge Williams states at 483 F.Supp. 442-446, as follows:

> "Reading the relevant sections of the act together, it is apparent that a cessation order can be given by an inspector in the field without any hearing. This then leads to the

mandatory assessment of a civil penalty; before the expiration of the thirty days in which an operator is entitled to a hearing, he may be subject to civil penalties in the amount of one hundred fifty thousand dollars ($150,000), without having had a hearing of any kind. If he does not pay the penalty, then he has waived his right to protest the order or the penalty amount. If the operator does not cease mining, then he may be fined or imprisoned. The entire basis of a conviction under the act could be refusal to comply with a cessation order that has been entered without any hearing."

In State of Indiana vs. Andrus, 501 F.Supp. 452, (S.D.Ind. 1980), (appeal pending in the U.S. Supreme Court #80-231), the Court addresses the question of whether or not the approximate original contour provisions of the Surface Mining Control and Reclamation Act constituted deprivation of substantive due process, therefore, violating Fifth Amendment guarantees. By requiring all states to conform to the same requirement without allowing for natural variances and topography, the district court felt such

requirement to be "discriminatory, arbitrary and irrational treatment."

This case further holds that the section of the Act which requires persons charged with violation of the Act, regulations or permit conditions to prepay the full amount of proposed penalty for such alleged violation as a condition precedent to contesting either the fact of the violation or the amount of the proposed penalty violated due process requirements of the Fifth Amendment.

We strongly believe that based on presently pending Supreme Court review of the constitutional questions raised in Virginia Surface Mining and Reclamation, Inc., vs. Andrus, supra; State of Indiana vs. Andrus, supra, and Marshall vs. Dewey, supra, presently under review by this Court, that this Criminal Defendant is entitled to review of this case.

Pursuant to Rule 17 of the rules of this Court, we feel this case presents special and important reasons for the Court to grant the writ.

We believe the Sixth Circuit's decision in this case is in conflict with cases presently pending before this Court in Virginia Surface Mining, supra; State of Indiana vs. Andrus, supra, and Marshall vs. Dewey, supra. Further, we do not believe the Sixth Circuit Court of Appeals addressed the issues in this case and they represent an important question of federal law which has not been, but should be, settled by this Court. The decision by the Sixth Circuit in this case was certainly in opposition with the decision rendered by the district court in in Virginia Surface Mining vs. Andrus, supra, Marshall vs. Dewey,supra, and Indiana vs. Andrus, supra.

The Sixth Circuit did not cite, distinguish or discuss any case which had reviewed the constitutionality of the Surface Mining Act of 1977.

Respectfully submitted,

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By: _____
YANCEY WHITE

By: _____
R. KEITH NOLLEY
Attorneys for Petitioner,
Letcher T. White

PROOF OF SERVICE

I, Yancey, White, attorney for Defendant - Appellant - Petitioner, being first duly sworn, hereby certify that I have served 40 copies of the Petition for Writ of Certiorari on the Clerk of the U. S. Supreme Court, 1 First Street N.E., Washington, D.C. 20543; two copies of the Petition for Writ of Certiorari on the Solicitor General, Department of Justice, Washington, D.C. 20530; two copies of the Petition for Writ of Certiorari on Mr. Patrick H. Molloy, United States Attorney, P.O. Box 1490, Lexington, Kentucky, 40501; two copies of the Petition for Writ of Certiorari on Katherine A. Oberly, c/o Department of Justice, Washinton, D.C. 20530; two copies of the Petition for Writ of Certiorari on Richard H. Levi, Department of Justice, Washington, D.C. 20530; all of the above served by depositing same in the United States Post

Office with first-class postage prepaid addressed as aforesaid on the addresses shown on the 29th day of May, 1981.

On the 29th day of May, 1981, personally appeared Yancey White, known to me to be the person whose name is subscribed to the foregoing proof of service and acknowledged to me that he executed the same for the purposes therein expressed.

Given under my hand and seal of office on this the 29th day of May, 1981.

Nila Hill, Notary Public
State of Texas

Commission Expires: 6-2-82

APPENDIX

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30 U.S.C.A.§ 1268(a,b,c,d,e,f,) . . .	A16
30 U.S.C.A.§ 1271 (2)	A18
30 C.F.R. § 715.15 (a)(7)	A19
30 C.F.R. § 716.2 (a)(1).	A21

APPENDIX

NO. 79-5386

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v	)	O R D E R
	)	
LETCHER T. WHITE,	)	
	)	
Defendant-Appellant	)	

Before: KEITH, BROWN and KENNEDY, Circuit Judges.

Defendant-appellant, Letcher White, was convicted of wilfully and knowingly refusing to comply with a cessation order in violation of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 et seq. The cessation order had been issued pursuant to the Act and had directed White to correct a condition with respect to allowing organic material and spoil to remain on downslopes of the mine he was

operating and to correct his failure to transport and place spoil in a controlled manner.

On appeal, White makes numerous contentions, including a contention that the district court erred in failing to suppress evidence obtained by a warrantless inspection of the mining property, a contention that the district court erred in failing to dismiss the indictment on the ground that the Surface Mining Control and Reclamation Act is unconstitutional, that the district court erred in permitting the government to amend the information prior to trial, that the district court erred in ruling that the cessation order was, as a matter of law, valid, and other contentions.

Upon consideration of the briefs and argument, this court has concluded that none of White's contentions are well taken and that the judgment of conviction, after

a jury trial, must be affirmed. The court noted that under the Act, the issuance of a cessation order under the circumstances presented her does involve the exercise of judgment on the part of the official who is authorized to issue the order, and that, further, violation of the cessation order is made criminal. However, we also note that, under the Act, White had the right to seek review of the cessation order that was issued, and that he did not in any way avail himself of his right of review. This being true, we are satisfied that it was not a violation of White's constitutional rights when he was convicted of a violation of this cessation order.

It is therefore Ordered that the judgment of the district court be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

UNITED STATES DISTRICT COURT

for

EASTERN DISTRICT OF KENTUCKY

UNITED STATES OF AMERICA

vs.

LETCHER WHITE

Docket NO. LONDON 78-40

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date -----October 31, 1979

WITH COUNSEL--Yancey White, John Aubry & John Lyttle

There being a Verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of Failing and refusing to comply with an order of Cessation issued by Office of Surface Mining Reclamation and Enforcement, Department of Interior, in violation of Title 30, Section 1268(d) (f), United States Code.

The court asked whether defendant had anything to say why judgment should not be pronounced because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ONE (1) YEAR

It is ADJUDGED that the defendant shall serve THIRTY (30) DAYS imprisonment on the above sentence and the balance of sentence is suspended and the defendant is placed on Probation for a period of ONE (1) YEAR, WITHOUT SUPERVISION, to commence upon the defendant's release from confinement.

Imprisonment on the above sentence to be served consecutive to the sentence imposed in Criminal Action NO. 79-6.

It is ADJUDGED that the defendant be fined $5,000.00 with payment of said fine to be made within six (6) months from this date.

It is FURTHER ADJUDGED That imprisonment on above sentence is stayed until December 27, 1979, at which time defendant shall surrender to the authorities at the designated institution. The defendant shall remain on his present bond until his surrender to the institution.

A presentence report was submitted to the Court before imposition of sentence and copies of report furnished counsel pur. Rule 32, F.R.C.P.

In addidtion to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out of the reverse side of this judgment be imposed. The Court may change the conditions of probation, and at any time during the probation

period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occuring during the probation period.

The court orders commitment to the custody of Attorney General and recommends Federal Correctional Institution at Lexington, Kentucky.

CERTIFIED AS A TRUE COPY ON
THIS DATE 11-2-9
by _____
Shirley Miller
Deputy

U.S. District Judge

_____
Eugene F. Siler, Jr., Judge
Date: November 1979

CRIMINAL DOCKET - U.S. District Court

0643 | 6 | 4305 | 4305 | U.S. | WHITE, LETCHER | 12 15 | 78 | 40 | 3

OFFENSES CHARGED

30:1268(e)(f) Failing & refusing to comply with Order of Cessation issued by Dept.of Interiorl

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST OF	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
A 12/18/78	Information X 12-15-78	12/20/78	4/30/79	5/4/79
12/20/78			5/2/79	10/31/
			5/4/79	

MAGISTRATE

DATE	INITIAL APPEARANCE DATE	PRELIMINARY EXAMINATION	REMOVAL HEARING	WAIVED	NOT WAIVED	INDICTMENT
		Date Scheduled	Date Held			

ATTORNEYS

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Corpus Christi Texas 78403

John Lyttle & John A
P. O. Box 451
Manchester,Ky. 40962

HURT-2;W.D. Coal Co.-3

DATE	PROCEEDINGS
12-15-78	1. Information filed. (At Lexington)
12-15-78	2. ORDER filed & ent: On motion of U. S. filed 12-15-78, warrant to issue returnable 12-20-78 at 2:00 P. M. at LEXINGTON; bond fixed at $5,000.00, Own Recognizance. Copies as noted. Warrant issued & delivered to Marshal.
12/18	4. APPEARANCE BOND in amount $5,00.00 ret. 12/20/78, 2 P.M. at LEX. executed by deft. WITHOUT SURETY, at London 12/18/78, filed.
12/18	6. War. for Arrest of Deft., w/ret. of U. S. Mar., filed: Deft. arrested 12/18/78.
12/21	8. Crim. Min - Arraignment & Plea (ORDER signed, filed 12/20/78,)ent.: On 12/20/78 at Lex. War. heretofore iss. set aside & summons to iss. w/bond fixed at $1,000.00. O.R. Bond heretofore executed by deft. to stand; deft. waived formal arraignment; ent. plea Not Guilty; Deft. given 20 days to file motions; Trial set for 2/12/79, 1:30 P.M. at LON. Deft. to remain on bond. Copies as noted.

NOTE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	WHITE 78-40 — IV PROCEEDINGS (CONTINUED) — PAGE TWO	V EXCLUDABLE DELA
1978:		
12-21	12 Summons, with return of Marshal, filed. Executed on deft. 12-20-78.	
1979:		
1/15	13 Motion of Deft. for Extension of Time to & including 1/31/79 to file preliminary motions, filed.	
1-19	14 ORDER signed & filed 1-16-79, ent: Deft. granted ext. of time to 1-31-79 to file preliminary motions. Copies as noted.	
1-1	15 Defts' Motion for Discovery and Inspection, filed.	
1-1	16 Defts' Motion to Suppress Illegally Obtained Evidence, filed.	
1-1	17 Defts' Motion to Dismiss for Violations of the Defts' Fourth and Fifth Amendment Constitutional Rights, filed.	
1-1	18 Defts' Motion to Dismiss the Information, filed.	
1-1	19 Defts' Motion for Bill of Particulars, filed.	
1-1	20 Defts' Motion to Dismiss for Abuse of Process; filed.	
2-8	21 ORDER signed, filed 2/6/79, ent.: By agreement of parties, trial continued from 2/12/79, 1:30 P.M. until APRIL 2,1979, 9:30 A.M. at LONDON. Copies as noted.	
2-12	22 ORDER signed, filed & ent.: set for HEARING on 3/5/79 at LON. 10 A.M. on various motions filed by deft. on 2/1/79. Copies as noted.	
3-5	23 Defendant's Brief in support of Motion to Dismiss, filed.	
3-7	24 Crim. Min - Gen. (ORDER signed, filed, ent): On 3/6/79 at London hearing had on pending motions. Deft's Motion for Bill of Particulars Overruled; U.S. granted 10 days to file brief in opposition & deft. 7 days to respond to Deft's Motion for Discovery & Inspection; Motion to Suppress; & motions to Dismiss; Clerk forward record at expiration 17 days. Oral Mot. U.S. to continue sustained & matter continued to 4/30/79, 1:30 PM at London for jury trial. Time between 2/1/79 & until date ruling is made on motions exclud. pur. 18:3161(h)(1)(E)(G). Defts. remain on bond. Copies as noted.	3 2-1-79 4-30-79
3-5	25 Crim. Min - Gen., filed: On 3/5/79 hearing begun at Lon. on defts' pending motions; Pars. 1,2,3, 5, 6(1st sentence), 7,8, 13 granted & pars. 4, 6(2nd sentence), 9,10,11,12, & 14 overruled in defts. Motion for Discovery & Inspection. Hearing on defts' Mots. to Suppress; Mot. to Dismiss for viol. of defts; 4 & 5th amendment constitutional rights; Mot. to Dismiss; Mot. Bill of Particulars & Mot. Dismiss for Abuse of Process cont. for hearing 3/6/79, 9:30 A.M. Copies as noted.	

FINE AND RESTITUTION PAYMENTS

RECEIPT NUMBER	CC NUMBER	DATE	RECEIPT NUMBER	CC NUMBER

NITED STATES DISTRICT COURT
RIMINAL DOCKET U.S. vs WHITE, LETCHER

78 40 1
Vs. | Docket No.

DATE 1979:	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE D (a)	(b)	(c
3/16	26. Memorandum of U. S. in opposition to defts' Memorandum in support of defts' motions to Dism. filed.			
4/2	27. Deft's Memorandum in Response to Memorandum of U.S. in opposition to deft's Motion to Dism. filed.			
4/30	28. Crim Min - Trial, filed: On 4/30/79 jury selected but not sworn; cont. to 5/2/79, 9:30 AM. for further trial. Deft. to remain on bond. Copies as noted.			
4/30	29. Crim Min - Gen. filed: on 4/30/79 hearing had on all pending motions: Defts' Mot. to Suppress Illegally Obtained Evidence is Overruled; Defts' Motion to Dismiss f[illegible] Violation of 4th & 5th Amendment constitutional rights is overruled; defts' Motion to Dismiss, overruled; Oral Mot. of U. S. in Limine is overruled.			
5/1	30. SUPERSEDING INFORMATION filed as to Letcher White & W.D.Coal.			
5-2	31. Crim Min - Trial, filed: On 5-2-79 jury sworn; evidence for plff. begun, not conclud.; case cont. to 5-3-79, 9:30 AM; deft. remain on bond. Copies as noted.			
5-4	32. ORDER signed, filed & ent: On 5-2-79 at London, Mot. of U.S. to amend Crim Information pur. to Rule 7(e) of F.R.C.P. sustained & Superseding Information is filed; Oral mots. of defts in Limine to prevent testimony concerning viols. at deft's mine at time prior to deft's ownership sustained; Oral mot. of deft. for further production of documents overruled; jury sworn & evidence for plff. begun; deft's mot. to prevent witness David Schindler from testifying overruled. Copies as noted.			
5-4	33. Crim Min - Trial, filed: On 5-3-79 at London, jury trial resumed; evidence for plff. concluded; evidence for deft. begun, not conclud; case cont. to 5-4-79 at 9:30 AM for further trial. Deft. to remain on bond. Copies as noted.			
5/4	34. Crim. Min - Trial, filed: on 5/4/79 at London jury trial resumed & concluded; Renewed mot. deft. for Judgment of Acquittal overruled; Jury Verdict - Guilty. Cont. to 6/25/79, 1:30 P.M. for sentencing; deft. to remain on bond. Copies as noted.			
5/4	35. JURY VERDICT - Guilty, filed.			
6/18	37. Crim. Min - Gen., filed: On 6/18/79 at London case called to cont. trial in Lon. Cr. 79-6 and parties being in agreement, Sentencing in this case is cont. to 9/17/79, 1:30 P.M. At LON, copies as noted.			

O 256A

TE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DEL (a)	(b)	(c)
0	38. ORDER signed, filed & ent.: On 9/5/79 at LON. hearing had; deft;s mot. to cont. trial date of 9/17/79, 1:30 P.M. in CR. 79-6 sustained due to illness of deft; but, sentencing in this action set for 10/29/79, 1:30 P.M. if deft. is physically able. Deft. remain on bond. Copies as noted.			
3	39. ORDER signed & filed 10-2-79, ent: Sentencing scheduled for 10-29-79 at 1:30 p.m. is continued to 10-31-79, 9:30 A.M. at London. Copies as noted.			
22	ORD sig., filed ent: Sent. still set for 10/31/79, 9:30 A.M. Copies as noted.			
31	40. Deft.'s Pre-Sentence Memorandum, filed.			
31	41. Court's Advice of Right to Appeal, filed.			
/2	42. JUDGMENT & PROBATION & COMMITMENT ORDER signed, filed & ent.: On 10/31/79 at London deft. rec. sentence of 1 yr. impr.--30 days TO BE SERVED & remainder suspended - Prob. 1 Yr. WITHOUT supervision; impr. be served consecutive to sentence imposed in Cr. 79-6; FINE: $5,000.00 to be paid within six months from this date; sentence stayed until 12/27/79 & deft. to surrender to authorities at designated institution & to remain on bond until his surrender; pre-sentence report furnished to Court & Counsel; Recommended commitment to FCI, Lex.,Ky. Copies as noted.			
8	44. Notice of Appeal filed by deft Letcher T. White, filed.			
12	45. Deft's Motion for Bond Pending Appeal, filed.			
13	46. ORDER signed & filed 12-11-79, ent: Deft's motion for bond pending appeal is set for hearing on 12-18-79, 4:30 p.m. at London. Copies as noted.			
20	48. Crim Mins-General & ORDER signed, filed & ent: On 12-18-79 at London, deft.'s motion for bond pending appeal sustained & bond pending appeal set in amt. of $1,000.00 without sur. Copies.			
18	47. APPEAL BOND in amt $5,000.00 w/o sur. executed & filed.			
980: /21	49. Copy of Order from 6CCA granting ext. of time to & including 2/5/80 to transmit record on appeal, filed. Copies as noted.			
11	50. Copy of Order from 6CCA granting ext. of time to & including 3-5-80 to transmit record on appeal, filed. Copies as noted.			
20	51. Copy of Order from 6CCa granting ext. of time to & including 3-25-80 to transmit record on appeal, filed. Copies as noted.			
25	52. Copy of Order from 6CCA granting ext. of time to & including 5-23-80 to complete transcript filed. Copies as noted			

Interval (see Section II) | Con Date (Crs Only) | Lv. (Civil)

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U.S. vs WHITE, LETCHER T.

78 | 40
Yr. | Docket No.

DATE 1980	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE (a)	(b)
5/23	53. TRANSCRIPT OF EVIDENCE & PROCEEDINGS on April 30, 1979; May 2, 1979; May 3, 1979 & May 4, 1979, filed. (4 VOLUMES).		
5/27	Certified Record on Appeal forwarded 6CCA, by cert. Mail No. 1108166, return receipt req.		

NO. 79-5386

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	ORDER
	)	
-v-	)	DENYING
	)	
LETCHER T. WHITE,	)	PETITION
	)	
Defendant-Appelant	)	FOR REHEARING

Before: KEITH, BROWN and KENNEDY, Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

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lic review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining. The Secretary shall promulgate such modifications in accordance with the rulemaking procedure established in section 1251 of this title.

Pub.L. 95-87, Title V, § 516, Aug. 3, 1977, 91 Stat. 495.

Legislative History. For legislative history and purpose of Pub.L. 95-87, see 1977 U.S.Code Cong. and Adm.News, p. 593.

Index to Notes

Interim program regulations 1
Concurrence of Mine Enforcement and Safety Administration 2

1. Interim program regulations

Promulgation by the Secretary of six limited provisions regulating the surface effects of underground mining in the interim program was not arbitrary, capricious or inconsistent with law. In re Surface Min. Regulation Litigation, D.C.D.C.1979, 452 F.Supp. 327.

2. Concurrence of Mine Enforcement and Safety Administration

This section which provides in relevant part that rules concerning the surface effects of underground mining shall not be promulgated until the Secretary has obtained written concurrence of the head of the department which administers the Federal Coal Mine Health and Safety Act requires only that the Secretary obtain concurrence of the Secretary of Labor before promulgating permanent regulation concerning surface effects of underground mines; section does not require that the Secretary obtain the concurrence of the administrator of the Mine Enforcement and Safety Administration prior to promulgation. In re Surface Min. Regulation Litigation, D.C.D.C.1979, 452 F.Supp. 327.

The Secretary did not have to obtain concurrence of the administrator of the Mine Enforcement and Safety Administration prior to promulgating interim regulations concerning the surface effects of underground mines. Id.

§ 1267. Inspections and monitoring—Inspections of surface coal mining and reclamation operations.

(a) The Secretary shall cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs or to develop or enforce any Federal program, and for such purposes authorized representatives of the Secretary shall have a right of entry to, upon, or through any surface coal mining and reclamation operations.

Records and reports; monitoring systems; evaluation of results

(b) For the purpose of developing or assisting in the development, administration, and enforcement of any approved State or Federal program under this chapter or in the administration and enforcement of any permit under this chapter, or of determining whether any person is in violation of any requirement of any such State or Federal program or any other requirement of this chapter—

(1) the regulatory authority shall require any permittee to (A) establish and maintain appropriate records, (B) make monthly reports to the regulatory authority, (C) install, use, and maintain any necessary monitoring equipment or methods, (D) evaluate results in accordance with such methods, at such locations, intervals, and in such manner as a regulatory authority shall prescribe, and (E) provide such other information relative to surface coal mining and reclamation operations as the regulatory authority deems reasonable and necessary;

(2) for those surface coal mining and reclamation operations which remove or disturb strata that serve as aquifers which significantly insure the hydrologic balance of water use either on or off the mining site, the regulatory authority shall specify those—

(A) monitoring sites to record the quantity and quality of surface drainage above and below the minesite as well as in the potential zone of influence;

(B) monitoring sites to record level, amount, and samples of ground water and aquifers potentially affected by the

mining and also directly below the lowermost (deepest) coal seam to be mined;

(C) records of well logs and borehole data to be maintained; and

(D) monitoring sites to record precipitation.

The monitoring data collection and analysis required by this section shall be conducted according to standards and procedures set forth by the regulatory authority in order to assure their reliability and validity; and

(3) the authorized representatives of the regulatory authority, without advance notice and upon presentation of appropriate credentials (A) shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained under paragraph (1) of this subsection are located; and (B) may at reasonable times, and without delay, have access to and copy any records, inspect any monitoring equipment or method of operation required under this chapter.

Inspection intervals

(c) The inspections by the regulatory authority shall (1) occur on an irregular basis averaging not less than one partial inspection per month and one complete inspection per calendar quarter for the surface coal mining and reclamation operation covered by each permit; (2) occur without prior notice to the permittee or his agents or employees except for necessary onsite meetings with the permittee; and (3) include the filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of this chapter.

Maintenance of sign

(d) Each permittee shall conspicuously maintain at the entrance to the surface coal mining and reclamation operations a clearly visible sign which sets forth the name, business address, and phone number of the permittee and the permit number of the surface coal mining and reclamation operations.

Violations

(e) Each inspector, upon detection of each violation of any requirement of any State or Federal program or of this chapter, shall forthwith inform the operator in writing, and shall report in writing any such violation to the regulatory authority.

Availability of information to public

(f) Copies of any records, reports, inspection materials, or information obtained under this subchapter by the regulatory authority shall be made immediately available to the public at central and sufficient locations in the county, multicounty, and State area of mining so that they are conveniently available to residents in the areas of mining.

Conflict of interest; penalty; publication of regulations; report to Congress

(g) No employee of the State regulatory authority performing any function or duty under this chapter shall have a direct or indirect financial interest in any underground or surface coal mining operation. Whoever knowingly violates the provisions of this subsection shall, upon conviction, be punished by a fine of not more than $2,500, or by imprisonment of not more than one year, or by both. The Secretary shall (1) within sixty days after August 3, 1977, publish in the Federal Register, in accordance with section 553 of Title 5, regulations to establish methods by which the provisions of this subsection will be monitored and enforced by the Secretary and such State regulatory authority, including appropriate provisions for the filing by such employees and the review of statements and supplements thereto concerning any financial interest

which may be affected by this subsection, and (3) report to the Congress as part of the Annual Report (section 1256 of this title) on actions taken and not taken during the preceding year under this subsection.

Review; procedures for inspections

(h)(1) Any person who is or may be adversely affected by a surface mining operation may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter which he has reason to believe exists at the surface mining site. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation. The Secretary shall furnish such persons requesting the review a written statement of the reasons for the Secretary's final disposition of the case.

(2) The Secretary shall also, by regulation, establish procedures to insure that adequate and complete inspections are made. Any such person may notify the Secretary of any failure to make such inspections, after which the Secretary shall determine whether adequate and complete inspections have been made. The Secretary shall furnish such persons a written statement of the reasons for the Secretary's determination that adequate and complete inspections have or have not been conducted. Pub.L. 95-87, Title V, § 517, Aug. 3, 1977, 91 Stat. 498.

Legislative History. For legislative history and purpose of Pub.L. 95-87, see 1977 U.S.Code Cong. and Adm.News, p. 593.

1. Search

Where coal industry could be distinguished from ordinary businesses by its long tradition of close government supervision, where primary concern of this chapter was public health and safety and where warrantless search provisions of this chapter and regulations promulgated pursuant to this chapter limited warrantless searches in time, place, and scope, warrantless search provisions were valid. In re Surface Mining Regulation Litigation, D.C.D.C 1978, 456 F.Supp. 1301.

§ 1268. Penalties—Civil penalties for violations of permit conditions and provisions of this subchapter

(a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 1252 of this title or during Federal enforcement of a State program pursuant to section 1271 of this title, any permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 1271 of this title, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Hearing

(b) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 1271 of this title. Any hearing under this section shall be of record and shall be subject to section

554 of Title 5. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

Notice of violation; action required of violator; waiver of legal rights

(c) Upon the issuance of a notice or order charging that a violation of the chapter has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Civil action to recover civil penalties

(d) Civil penalties owed under this chapter, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

Willful violations

(e) Any person who willfully and knowingly violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 1252 of this title or during Federal enforcement of a State program pursuant to section 1271 of this title or fails or refuses to comply with any order issued under section 1271 or section 1276 of this title, or any order incorporated in a final decision issued by the Secretary under this chapter, except an order incorporated in a decision issued under subsection (b) of this section or section 1294 of this title, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

Corporate violations

(f) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 1252 of this title or Federal enforcement of a State program pursuant to section 1271 of this title or fails or refuses to comply with any order issued under section 1271 of this title, or any order incorporated in a final decision issued by the Secretary under this chapter except an order incorporated in a decision issued under subsection (b) of this section or section 1293 of this title, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

False statements, representations, or certifications

(g) Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plant, or other document filed or required to be maintained pursuant to a Federal program or a Federal lands program or any order of decision issued by the

§ 1271. Enforcement—Notice of violation; Federal inspection; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders

(a)(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(3) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 1252, or section 1254(b) of this title or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more

PERTINENT PARTS

of

30 C.F.R. § 715.15 (a)(7)

§ 715.15 Disposal of spoil and waste materials in areas other than the mine workings or excavations.

(a) Disposal of spoil in other than valley or head-of-hollow fills. Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled (engineered) manner in disposal areas other than the mine workings or excavations only if all the following conditions, in addition to the other requirements of this part, are met:

* * * * * * *

(7) The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow

surface drainage to be compatible with the natural surroundings, and to ensure long-term stability. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 715.13. Terraces shall not be constructed unless approved by the regulatory authority.

PERTINENT PARTS

of

30 C.F.R. § 716.2 (a)(1)

§ 716.2 Steep-slope mining.

(a) The permittee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, or on lesser slopes that require measures to protect the area from disturbance, as determined by the regulatory authority after consideration of soils, climated, the method of operation, geology, and other regional characteristics, shall meet the following performance standards. The standards of this section do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or where the mining is governed by § 716.3.

(1) Spoil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, shall not be placed or allowed to remain on the downslope.

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2055

In the Supreme Court of the United States

OCTOBER TERM, 1980

LETCHER T. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
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Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, which require warrantless inspections of surface mining operations, conform to the Fourth Amendment.

2. Whether petitioner's conviction for willfully failing to comply with a cessation order issued by the Department of the Interior should be reversed for alleged violations of his due process rights where petitioner refused to utilize procedures for prompt administrative and judicial review afforded by the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2055

LETCHER T. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the order of the court of appeals affirming the judgment of conviction (Pet. App. A1-A3) nor the judgment and probation/commitment order of the district court (Pet. App. A4-A7) is reported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1981. A petition for rehearing was denied on April 3, 1981 (Pet. App. A13). The petition for a writ of certiorari was filed on June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of failing and refusing to comply with a cessation

order issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM), in violation of 30 U.S.C. (Supp. III) 1268(e) and (f). He was sentenced to one year's imprisonment, all but 30 days of which was suspended in favor of unsupervised probation, and was fined $5,000.

1. The facts leading up to the issuance of the cessation order and petitioner's refusal to comply with it are largely undisputed. On October 20, 1978, David Schindler, a reclamation specialist with OSM, performed a visual inspection of petitioner's strip mining operations. At that time, Schindler observed four separate violations of regulations promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.* In accordance with OSM procedures, Schindler issued a notice of violation, which required that the violations be abated by November 3, 1978 (Pet. 11). The notice of violation expressly stated that administrative review was available and explained how to obtain it (A. 244-245).[1] The notice also warned that failure to abate any of the violations within the time period set would result in the issuance of a cessation order (A. 245).

Two of the violations cited by Schindler were corrected within the abatement period and are not at issue in this case. One of the two remaining violations cited in the notice of violation (Violation No. 4) was allowing organic material and spoil to remain on the downslopes, in violation of 30 C.F.R. 716.2(a)(1). The notice specified that the required remedial action was to pull the trees off the downslope (A. 247). The remaining violation (Violation No. 2) was petitioner's "failure to transport and place spoil in a controlled manner in hollow fills No. 2 and No.3" (A. 246). Again, the notice of violation prescribed the necessary remedial action:

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[1] "A." refers to the appendix filed in the court of appeals.

cessation of end-dumping into the hollow fills, placement of a rock toe in the fill, working the material to the toe of the fill and compacting the material in lifts not to exceed four feet in thickness (*ibid.*).

On November 3, 1978, Schindler returned to the mine site for a follow-up inspection. At that time, he discovered that petitioner had not corrected the two violations described above (A. 58-60). Schindler then prepared a cessation order, based on the two outstanding violations (A. 248-251), which he personally served on petitioner on November 6 (A. 63-64). The cessation order expressly directed petitioner to "cease all mining operations except those operations related to reclamation of previously disturbed areas" (A. 250-251). It also advised petitioner of his right to an appeal and specifically warned that a willful and knowing failure to comply with the order would subject him to criminal prosecution, including imprisonment of up to one year and a fine of up to $10,000 (A. 249).

Schindler agair returned to the site on November 13, 1978. At that time, he observed that coal was still being mined and that the violations that were the subject of the cessation order had not been corrected (A. 64, 66; Pet. 12 ("Defendant Letcher White continued to mine")).

2. On December 15, 1978, the United States filed a one-count information charging petitioner and W.D. Coal Company, which is substantially owned and controlled by petitioner, with wilfully and knowingly refusing to comply with a cessation order, in violation of 30 U.S.C. (Supp. III) 1268(e) and (f).[2] With the exception of a Motion for Discovery and Inspection, which the district court granted in part and denied in part, the district court denied all of

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[2]A superseding information also naming petitioner and the W.D. Coal Company was filed on May 1, 1979 (Pet. App. A10).

petitioner's pretrial motions, including a Motion to Suppress Illegally Obtained Evidence, a Motion to Dismiss for Violation of the Defendant's Fourth and Fifth Amendment constitutional rights, a Motion for Bill of Particulars and a Motion to Dismiss for Abuse of Process (Pet. App. A8-A10). On May 4, 1979, the jury returned a verdict of guilty. The court of appeals affirmed (Pet. App. A1-A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 14-15) that the Surface Mining Act's authorization of warrantless inspections of surface coal mine sites violates the Fourth Amendment and that, therefore, the evidence obtained as a result of Schindler's warrantless inspections of petitioner's mine site should have been excluded. The court below correctly rejected this contention.

The present case is controlled by this Court's recent decision in *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), rev'g *Marshall* v. *Dewey*, 493 F. Supp. 963 (E.D. Wis. 1980), on which petitioner relies (Pet. 15, 19-20). In *Dewey*, the Court upheld Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. III) 813(a), which authorizes warrantless inspections of underground and surface mines, as within the *Colonnade-Biswell* exception to the Fourth Amendment's warrant requirement. *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). In so holding, the Court for the first time made clear (slip op. 11-12) that

> it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment[;] * * * [and that while] the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary[,] * * * if the length of regulation were the only criteria, absurd results would occur.

This Court's decision in *Dewey* thus constitutes explicit recognition that coal mining, including surface coal mining, is a pervasively regulated industry, which comes within the *Colonnade-Biswell* exception to the warrant requirement.[3]

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[3]Stone quarries, the specific segment of the mining indusry involved in *Dewey*, have been regulated only since 1966 (slip op. 11 & n.10). Similarly, the sale of firearms, which was the industry involved in *United States* v. *Biswell, supra*, has been regulated only since enactment of the Gun Control Act of 1968, 18 U.S.C. (& Supp. III) 921 *et seq.* Coal mining, on the other hand—in contrast to the mining industry in general, which is the subject of the Federal Mine Safety and Health Act (see 30 U.S.C. (Supp. III) 802(h))—has long been a pervasively regulated industry. Federal regulation began in 1910, with the formation of the Bureau of Mines (*Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 47 (S.D. Ohio 1973)), and the coal mining industry has been subject to warrantless federal inspection for 40 years (Federal Coal Mine Safety Act of 1941, ch. 87, 55 Stat. 177, 178). Provision for warrantless inspections was also included in the Federal Coal Mine Safety Act Amendments of 1952, ch. 877, 66 Stat. 692, 693. The industry presently is regulated by the following additional federal statutes: the Clean Water Act, 33 U.S.C. 1251 *et seq.*; the Clean Air Act, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* The industry also has been subject to long-standing regulation by many states. See *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1318 (D.D.C. 1978), aff'd in part and rev'd in part on other grounds, 627 F. 2d 1346 (D.C. Cir. 1980).

Moreover, the statutory scheme providing for warrantless inspections under the Surface Mining Act is remarkably similar to that of the Federal Mine Safety and Health Act of 1977, which this Court upheld in *Dewey*. Both begin with detailed congressional findings concerning the need to regulate the respective aspects of the mining industry (30 U.S.C. (Supp. III) 801, 1201, 1202). Both require warrantless inspections of all mines covered by the respective legislation at statutorily prescribed intervals (30 U.S.C. (Supp. III) 813(a) and (i), 1252(e)(1), 1267). Both statutes and the regulations promulgated pursuant to them describe specifically the standards with which a mine operator must comply and to which the inspections are geared (*Donovan* v. *Dewey, supra,* slip op. 11-12; 30 U.S.C. (Supp. III) 1252(c), 1265). Both require the inspector to make follow-up warrantless inspections to ascertain whether previously discovered violations have been corrected (slip op. 2; 30 U.S.C. (Supp. III) 813(a), 1271(a)(3)), and both require the government to conduct an inspection if a miner reports an alleged violation (30 U.S.C. (Supp. III) 813(g), 1271(a)(1)). Moreover, both Acts concern dangerous conditions associated with mining, which easily could be concealed during the time it would take to obtain a warrant (see *Dewey, supra,* slip op. 8)[4], and both statutes provide for prompt administrative decisions (30 U.S.C. (Supp. III) 815(d), 816, 823(d), 1271, 1275, 1276). Finally, like the Mine Safety Act (30 U.S.C. (Supp. III) 818(a)), the Surface Mining Act provides (30 U.S.C. (Supp. III) 1271(c)) that if an operator refuses to allow an inspection, the inspector is required to

[4]The easily concealed hazardous conditions covered by the Surface Mining Act include improper discharges of acid or toxic waste water into ground or surface water systems and improper blasting.

seek an injunction before proceeding.[5] In sum, this Court's conclusion in *Dewey, supra*, slip op. 10-11, is equally applicable here:

> Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide. The Act itself clearly notifies the operator that inspections will be performed on a regular basis. Moreover, the Act and the regulations issued pursuant to it inform the operator of what health and safety standards must be met in order to be in compliance with the statute. The discretion of government officials to determine what facilities to search and what violations to search for is thus curtailed by the regulatory scheme. In addition, the statute itself embodies a means by which any special Fourth Amendment interests can be accommodated.[6]

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[5]The Surface Mining Act contains significant protections against the use of inspections as an instrument of harassment by government officials. The Act limits the purpose of the inspections to ascertaining compliance with the Act and the regulations, 30 U.S.C. (Supp. III) 1252(e)(1); it requires that the inspections be conducted at "reasonable times," 30 U.S.C. (Supp. III) 1267(b)(3); and it limits the geographic scope of the inspections to the mining and reclamation operations and the premises in which records required by the Act are located, 30 U.S.C. (Supp. III) 1267(b)(3). The Secretary has further limited the scope of warrantless searches by providing in his permanent regulations that a search warrant may be required for searches of a building, in contrast to site inspections. 30 C.F.R. 840.12; 30 C.F.R. 842.13. See also 44 Fed. Reg. 15594-15595 (1979). No buildings were searched in the present case.

[6]The lower courts that have considered the first question presented by the petition have upheld warrantless inspection provisions of the Surface Mining Act. See, *e.g., Andrus* v. *P-Burg Coal Co.*, 644 F. 2d 1231 (7th Cir. 1981); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1317-1319 (D.D.C. 1978), aff'd in part and rev'd in part on other grounds, 627 F. 2d 1346 (D.C. Cir. 1980).

2. Petitioner claims (Pet. 14-21) that his Fifth Amendment rights were violated because he did not receive a hearing before the issuance of the cessation order. This case does not involve issuance of a cessation order immediately upon discovery of an alleged violation, which is authorized by 30 U.S.C. (Supp. III) 1271(a)(2) where the violation "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *."[7] Rather, it involves a cessation order that was issued only after petitioner had refused to abate two violations of the Act and regulations promulgated pursuant to it within the time stipulated in a notice of violation.

As the court of appeals noted (Pet. App. A3), the Surface Mining Act provides ample opportunity for administrative and judicial review of such notices of violation and cessation orders. An aggrieved mine operator may obtain administrative review by the Secretary of a notice of violation or a cessation order, 30 U.S.C. (Supp. III) 1275(a)(1), including, as a matter of right, a formal hearing under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 554 (30 U.S.C. (Supp. III) 1275(a)(2)). When review is sought of a cessation order, the Secretary is required to issue a written decision within 30 days of receipt of the application for review. 30 U.S.C. (Supp. III) 1275(b). The mine operator

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[7]In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 31-36, the Court upheld the immediate cessation order provisions of 30 U.S.C. (Supp. III) 1271(a)(2) against a Fifth Amendment challenge. The Court also reversed the district court's decision that the five-day period provided in 30 U.S.C. (Supp. III) 1275(c) for the Secretary to respond to requests for temporary relief (see pages 8, 9, *infra*) was too long and overruled the district court's substitution of a 24-hour time limit (slip op. 36-37). The Court also upheld the Act against a number of facial attacks on its constitutionality. See also *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981).

also may request temporary relief "[p]ending completion of the [required] investigation and hearing," 30 U.S.C. (Supp. III) 1275(c), which request the Secretary must "expeditiously" grant or deny. *Ibid.* Where the request is for temporary relief from an order of cessation, the Secretary must grant or deny the request within five days. *Ibid.*

Notices of violation and orders of cessation also are "subject to judicial review [in the district courts] on or before 30 days from the date of such order or decision" under the Administrative Procedure Act standards of review, 30 U.S.C. (Supp. III) 1276(a)(2) and (b). Judicial review is also available from decisions of the Secretary denying temporary relief from cessation orders, 30 U.S.C. (Supp. III) 1276(c). The district courts are empowered to stay notices of violation and cessation orders pending their review. See 30 U.S.C. (Supp. III) 1276(d).

In addition, an operator may request the Secretary to modify, vacate, or extend any notice of violation or cessation order. See 30 U.S.C. (Supp. III) 1271(a)(5). Finally, in order for a cessation order to remain effective for more than 30 days, a hearing at or near the mine site must be held within 30 days of the operator's receiving actual notice of the cessation order. *Ibid.*

As the foregoing statutory scheme makes clear, where a cessation order is issued for failure to comply with a notice of violation, the time for the mine operator to challenge the Act and its implementing regulations begins when he receives the notice of violation. In this case, petitioner deliberately chose not to pursue the Act's administrative remedies, although the notice of violation he received specifically informed him of his opportunity to appeal and warned him that failure to abate the violations would result in the issuance of a cessation order. The only consideration relevant to the question whether the cessation order was properly issued in this case is whether violations described

in the notice of violation had been corrected at the time of Schindler's follow-up inspection. Petitioner nowhere alleges that he had corrected the violations at issue by the time of the reinspection on November 3, 1981, or even by the subsequent reinspection on November 13, 1981.

Consequently, any harm petitioner sustained was not the result of any deficiencies in the statutory review provisions, but, rather, was the result of petitioner's own refusal to avail himself of the procedures provided for by the Act. The adequacy of those procedures thus is not at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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